RECORD AND BRIEFS

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No. 17-387

In The
Supreme Court of the United States

UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN and RAY LUNDGREN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the Washington State Supreme Court's narrow exercise of *in rem* jurisdiction in this quiet title case concerning non-reservation land, where no sovereign interest existed because the Tribe could not have received legal title under state law, consistent with Washington state law on compulsory joinder and tribal sovereign immunity, and consistent with this Court's decisions upholding state *in rem* jurisdiction?

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INTRODUCTION

Respondents Sharline and Ray Lundgren commenced this quiet title action to protect their property rights in a strip of land that has been exclusively maintained and possessed by their family since 1947. The Lundgrens acquired title by adverse possession and mutual acquiescence *decades* before the Tribe acquired putative title in 2013 – the result of Washington law automatically vesting title in the Lundgrens via adverse possession and mutual acquiescence. The holding in this case is based on Washington state law on automatic title via adverse possession/mutual acquiescence, compulsory joinder, and *in rem* jurisdiction, although it is fully consistent with the federal case law reviewed and discussed in the decision by the Washington Supreme Court in *Lundgren v. Upper Skagit Indian Tribe*, 187 Wash.2d 857, 389 P.3d 569 (2017) (the "Opinion").

In its Petition for a Writ of Certiorari, the Upper Skagit Indian Tribe (the "Tribe") contends that review by this Court of the decision by the Washington Supreme Court is necessary because the court erred when it ruled that (1) Washington Civil Rule 19 did not require compulsory joinder of the Tribe, (2) state *in rem* jurisdiction allowed the trial court to hear and rule upon this quiet title action, and (3) that sovereign immunity did not bar the trial court's exercise of jurisdiction regardless of *in rem* jurisdiction. As to the first, Washington Civil Rule 19 does not by its terms or any reasonable interpretation trump the court's exercise of *in rem* jurisdiction if a party cannot

be joined. As to the second, sovereign immunity does not bar the exercise of *in rem* jurisdiction where a tribe received a conveyance of title many decades after title was lost through adverse possession. Third, consistent Washington and federal law recognize the appropriateness of the court exercising *in rem* jurisdiction in a case involving a tribe's claim to title. The Opinion by the Washington Supreme Court, which fully addressed compliance with federal law on Indian tribe sovereign immunity as articulated in *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 261-65, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992), rested largely on unique Washington law: Civil Rule 19 and its joinder requirement, the unique doctrine of automatic title in adverse possession, and the rule that a sovereign entity obtains no better title than the private party who conveyed to the sovereign. The court applied *Cnty. of Yakima* in its analysis and discussed the holding allowing the assertion of *in rem* jurisdiction by Yakima County over fee-patented reservation land, which was not an assertion of *in personam* jurisdiction over the Yakama Nation. "In other words, the Court had jurisdiction to tax on the basis of alienability of the allotted lands, and not on the basis of jurisdiction over tribal owners." Opinion at p. 866. The exercise of *in rem* jurisdiction in the present case is even narrower than in *Cnty. of Yakima* in that no reservation or allotted lands were involved.

As held by the Washington Supreme Court, to allow the transfer by a seller without title to a party without any better claim to title would undermine the

rule of law. The rule urged by the Tribe would have resulted in the erosion of three well-established legal principles in Washington jurisprudence:

1. The principle of automatic title through adverse possession, without the requirement of court intervention as a condition to entitlement, as articulated in *El Cerrito v. Ryndak*, 60 Wash.2d 847, 855, 376 P.2d 528 (1962);

2. The recognition that the conveyance of real property to a sovereign, after the seller's title was lost via adverse possession, does not vest good title in the sovereign, as articulated in *Gorman v. City of Woodinville*, 175 Wash.2d 68, 283 P.3d 1082 (2012);

3. The principle that Washington courts have *in rem* jurisdiction to rule on title ownership even if one of the parties is a sovereign entity such as an Indian tribe, as recognized in *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 261-65, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992), and subsequently applied by the Washington Supreme Court in *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash.2d 862, 869-72, 929 P.2d 379 (1996).

These bedrock legal principles have been consistently applied and followed in Washington, and Washington residents have arranged their affairs according to

these principles for decades. Importantly, the Tribe provided no explanation to address the broad implications of its position in this case: (1) the obvious unjust result of allowing a conveyance to an Indian tribe of a title previously lost by adverse possession and thereby automatically extinguish the adverse possession title, all with no possibility of judicial review (the Tribe did not provide any avenue of challenge in its own courts (Opinion, p. 872-73)); and (2) a tribe's claim to property anywhere in the state, regardless of who owns title under Washington law, would be absolutely immune to challenge by the true owner.

The Washington Supreme Court ruled that sovereign immunity does not bar this quiet title action because the Lundgrens' adverse possession-derived title to the disputed property was perfected while it was still owned by private individuals. That adverse possession title was, under Washington law, entitled to equal status with title derived by transfer via deed, all prior to a court's ruling. Washington law has consistently recognized that sovereign immunity does not bar a quiet title action when the claimant adversely possessed the disputed property *before* the sovereign acquired record. *Gorman v. City of Woodinville*, 175 Wash.2d 68, 283 P.3d 1082 (2012).

Whatever conflict might exist about the scope of state *in rem* jurisdiction over tribal property in other contexts, this case would be a poor vehicle for resolving it. The Tribe never acquired title to this sliver of disputed property, part of a 38-acre parcel over which no dispute exists, because the seller had no title to the

sliver. Washington law holds that trial courts possess *in rem* jurisdiction to determine property rights in real property located in Washington state, irrespective of whether the court has jurisdiction over the claimants, and that Washington Civil Rule 19 does not prevent the quiet title action from proceeding in the face of a sovereign immunity claim by a tribe.

REASONS FOR DENYING THE PETITION

A. No split of authority exists between the circuit courts.

The split of authority as characterized by the Tribe does not extend to the issue ruled upon by the Washington Supreme Court – the interplay of sovereign immunity under state law with compulsory joinder in the context of a quiet title action. In *Cnty. of Yakima* and *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), the Court affirmed the right of states to impose property taxes on land allotted under acts of Congress and later re-acquired by tribes in fee simple. The succeeding issue in *Oneida Nation v. Madison County*, 605 F.3d 149 (2d Cir. 2014), and *Cayuga Indian Nation of New York v. Seneca County, N.Y.*, 761 F.3d 218 (2d Cir. 2014), involved the right of counties to foreclose on the properties owned by the tribes. The issue of whether a tax foreclosure action was *in rem* and therefore not prohibited by sovereign immunity is qualitatively different than the issue at bar: whether a private party is entitled to

protection of property rights, via *in rem* jurisdiction, when that party would have no other forum in which to protect its rights, and when the rights existed *before* the tribe owned any interest in the subject property. Moreover, no split between federal circuit courts exists on the issue here: whether state *in rem* jurisdiction exists when an Indian tribe received bare legal title from a party with no title to give. Such an issue is both rare and not addressed by federal courts let alone more than a handful of state cases. This is an issue of state law and is the reason federal courts have not weighed in. A state's jurisdiction to control the ownership and disposition of real property within its territory is a core state prerogative. *See Fall v. Eastin*, 215 U.S. 1 (1909); *Clarke v. Clarke*, 178 U.S. 186 (1900).

The New Mexico case, *Hamaatsa, Inc. v. Pueblo of San Felipe*, No. 2017-NMSC-007, 388 P.3d 977 (N.M. 2016) is inapposite. First, no part of the court's analysis in *Hamaatsa* suggests that New Mexico's jurisprudence includes precedent comparable to Washington's (1) law of automatic adverse possession title without court intervention, (2) recognition that the conveyance of property to a sovereign, after title was lost via adverse possession, does not vest title in the sovereign, and (3) recognition that courts have *in rem* jurisdiction to rule on title ownership even if one of the contesting parties is an Indian tribe. These distinctions are both central and critical given that in *Hamaatsa* the real property at issue was undisputably owned by the tribe. At issue in *Hamaatsa* was an access road across the tribe's property, with a claim by the plaintiff access

road user that it was entitled to use the road as a public highway. There was no contention that the tribe did not own title to the subject property, making the analysis inapplicable to the present facts where, under Washington law, the Tribe received a deed from a party without title. The other state cases discussed in *Hamaatsa*, *Anderson* and *Cass County Joint Water Resource District v. 1.43 Acres of Land in Highland Township*, 2002 ND 83, 643 N.W.2d 685 (2002), supported the exercise of *in rem* jurisdiction in cases where a tribe claimed an interest in the subject property.

The Court's decision in *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014), is inapplicable to the present case, as *Bay Mills* did not concern or address the issue of *in rem* jurisdiction in the context of an Indian tribe that had no sovereign interest because it had no interest in the property under state law. Moreover, the Court observed in *Bay Mills* that Michigan had recourse to enforce its own statutory provisions and procedures allowing action for conduct in violation of state law. The only remedy afforded to the Lundgrens – *in rem* jurisdiction – is a narrow state law remedy that is not an abrogation of tribal sovereign immunity. The Opinion is not directly or indirectly contrary to the holding or rationale of *Bay Mills*, and does not test the edges of *Bay Mills* by, for instance, delving into the area of state enforcement of state law that would prohibit commercial activity on off-reservation land. Indeed, this Court noted in *Bay Mills* that sovereign immunity might not apply where, as here, a party

"who has not chosen to deal with a tribe . . . has no alternative way to obtain relief for off-reservation commercial conduct." *Bay Mills*, 134 S. Ct. 2036 n.8.

B. The Lundgrens' title by adverse possession was automatic and ripened long before the tribe acquired bare legal title.

The Tribe's Petition minimizes the importance under Washington law of the principle that adverse possession title constitutes valid and *immediate* title. The fact that a court has not ruled on the validity of title in a quiet title action does not detract from the legitimacy of the adverse possession title. When a person adversely possesses real property for ten years, such possession ripens into an original title. *El Cerrito v. Ryndak*, 60 Wash.2d 847, 855, 376 P.2d 528 (1962). Divestment of title does not occur differently or more easily to the person who acquires title passively by adverse possession than to the person who acquires title by deed. *Id.* Once a person acquires title by adverse possession, he cannot be divested of title to the property by "parol abandonment," relinquishment, verbal declarations, or any other act short of what would be required had he acquired his title by deed. *Mugaas v. Smith*, 33 Wash.2d 429, 431, 206 P.2d 332 (1949). A person who acquires title by adverse possession can convey it to another party without having had title quieted in him prior to the conveyance. *El Cerrito*, 60 Wash.2d at 855. The Lundgrens established that all of these legal requirements were fulfilled for a period of well over

ten years, which period elapsed more than 50 years before the commencement of their lawsuit.

C. Sovereign immunity does not bar this quiet title action because the court's *in rem* jurisdiction concerns the property itself – not the claimants.

Washington case law has consistently recognized that *in rem* jurisdiction vests broad authority in the courts to resolve disputes over real property, and that the court's jurisdiction is over the property itself. Personal jurisdiction over the contesting parties, even those with valid claims of ownership, is not necessary. *In re Acquisition of Land & Other Prop. By City of Seattle*, 56 Wash.2d 541, 544-45, 353 P.2d 955 (1960); *In re Condemnation Petition of City of Lynnwood*, 118 Wash.App. 674, 679, 77 P.3d 379 (2003).

Washington courts have consistently held that, under limited circumstances, courts may exercise *in rem* jurisdiction despite the assertion of immunity by a sovereign. Title by adverse possession can be acquired against a sovereign where the property was adversely possessed *before* the sovereign acquired title. *Gorman*, 175 Wash.2d at 70. The *Gorman* Court reasoned:

> If a claimant satisfies the requirements of adverse possession while land is privately owned, the adverse possessor is automatically vested with title to the subject property. The

> prior owner cannot extinguish this title by transferring record title to the state.

Id. at 74-75. While the sovereign in *Gorman* was a city, the principle was also applied to an Indian tribe that obtained title from a private party that had previously lost title via adverse possession. *Smale v. Noretep*, 150 Wash.App. 476, 208 P.3d 1180 (2009).

If the Tribe's immunity argument is accepted, anyone in Washington state who lost their interest in property to an adverse possessor could extinguish the adverse possessor's vested title by transferring record title to an Indian tribe. In other words, a tribe would automatically win despite never acquiring legitimate title. The Washington Supreme Court directly refuted this "absurd" consequence in *Gorman*, at p. 74.

D. This Court's *County of Yakima* case fully supports the majority opinion issued in this case.

That Washington courts have jurisdiction over this matter despite a claim of sovereign immunity was fully addressed and resolved by this Court. In *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 261-65, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992), Washington courts were held to have jurisdiction to authorize property taxes on the basis of alienability of allotted lands and not on the

basis of jurisdiction over their Indian owners. In so ruling, the Court upheld the county's assertion of jurisdiction even over on-reservation land "because the jurisdiction is *in rem* rather than *in personam*. . . ." *Id.* at 264-65. This case involves the state's authority to determine the ownership of off-reservation land to which the Tribe has never had title.

No practical or theoretical reason exists to treat the exercise of *in rem* jurisdiction over a quiet title action differently than *in rem* jurisdiction over a property tax case affecting tribal land. *In rem* jurisdiction over a claim involving title to real estate is a more orthodox application than over a claim involving *ad valorem* taxes. No logical distinction, nor meaningful difference, distinguishing the ruling and rationale of *Cnty. of Yakima* from the present case has been presented.

The court in *Anderson* addressed the Tribe's contention that *Cnty. of Yakima* allows only a limited exercise of *in rem* jurisdiction in cases involving federally-issued fee patent property (Motion at p. 9):

> The Quinault Nation argues that County of Yakima requires a finding in this case of express statutory authority in the GAA granting state jurisdiction over action involving reservation fee patented lands. But the Nation interprets the case too narrowly. . . . The Court also added that, while the provision removing 'all restrictions as to sale encumbrance, or taxation of [fee patented reservation] land' describes a state's entire range of 'jurisdiction to

> tax' allotted land, it does not purport to describe the entire range of a state's in rem jurisdiction over such land.

Anderson at p. 874. Moreover, *Anderson* notes that "[b]ecause the res or property is alienable and encumberable under a federally issued fee patent, it should be subject to a state court in rem action which does nothing more than divide it among its legal owners according to their relative interests." *Id.* at p. 873. Allowing state courts to exercise *in rem* jurisdiction over land that is neither fee patent nor allotted under the GAA, such as the case here, is an even easier conclusion to draw.

A review of *Cnty. of Yakima's* treatment of *in personam* and *in rem* jurisdiction over Indian tribes also reveals no constraint on the narrow type of state court *in rem* jurisdiction exercised in the present case. The Court rejected the contention that its prior cases prohibited state court jurisdiction over Indian-owned land:

> The Yakima Nation and the United States deplore what they consider the impracticable, *Moe*-condemned 'checkerboard' effect produced by Yakima County's assertion of jurisdiction over reservation fee-patented land. But because the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned; and it is not impracticable either.

Cnty. of Yakima at 691. Again, this sanction of *in rem* jurisdiction concerns reservation land – a more intrusive form of jurisdiction than the non-reservation land involved in the present case.

E. Washington Civil Rule 19 did not prevent the court's exercise of *in rem* jurisdiction.

Civil Rule 19 is a state rule of procedure and purely a matter of state law for interpretation and application by state courts. The Washington Supreme Court reasoned in the Opinion that, as a purely prudential standard, Civil Rule 19 does not require dismissal given that Washington trial courts have the power to exercise jurisdiction in an *in rem* action when the action concerns land acquired by adverse possession/mutual acquiescence before the tribe acquired record title. As the court found, the existence of sovereign immunity relies on the existence of a sovereign's interest. If no such interest exists, where for instance the sovereign could not have received actual legal title, there can be no sovereign immunity and nonjoinder of the tribe as a party is not a jurisdictional bar.

The fact that the Lundgrens had no recourse in tribal court to protect their family's 60-plus year interest in the subject property, or to receive any kind of justice, lies in stark contrast to Washington's Constitution, which vests in superior courts original subject matter jurisdiction to resolve *all* issues involving real property ownership. *Article IV, Section, Washington*

Constitution. The purpose of Civil Rule 19 is to serve "complete justice" by permitting disputes to proceed to adjudication only when all the parties can defend their claims. *Auto. United Trades Org. v. State*, 175 Wash.2d 214, 233, 285 P.3d 52 (2012). However, complete justice is not served if a party is denied relief because an absent party is a sovereign. *Id.* at 233.

CONCLUSION

Washington courts have *in rem* jurisdiction to protect property interests established before attempted conveyance to a sovereign entity such as an Indian tribe. The trial court in this case carefully and deliberately avoided exercising personal jurisdiction over the Tribe, and limited its jurisdiction solely to the *res* at issue in the case given the fact that the Tribe could exercise no sovereign interest. The court's decision in this case was squarely in line with *County of Yakima* and not opposed by subsequent decisions of this Court, and this consistent precedent controls and provides stable guidance for parties to structure their affairs. None of the other 29 Indian tribes in Washington State filed an

amicus curiae brief in the state courts advocating on behalf of the Tribe's position. The Lundgrens request that the petition be denied.

RESPECTFULLY SUBMITTED this 13th day of October 2017.

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